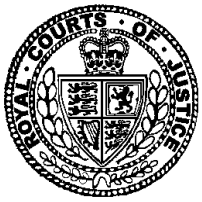

Neutral Citation Number: [2022] EWHC 973 (QB)

Case No: QB-2020-001291

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2022

Before :

MASTER STEVENS

- -

Between :

Adam Robert Giaquinto (1) **Capital International (Nominees) Limited (2)** **Gilbo Management Limited (3)** **HCT Management Limited (4)** **James Robert Edwards (5)** **Jonathan Charles Hammond (6)** **Montagu Square Limited (7)** **Philip Harvey Barnett (8)** **Stuart James Anderson (9)**	**Claimants**
- and -	
ITI Capital Limited **(formerly "Walbrook Capital Markets Ltd" and "FXCM Securities Ltd")**	**Defendant**

- -
- -

Paul O'Doherty (instructed by **iLaw**) for the **Claimants**
Bobby Friedman (instructed by **Rosenblatt**) for the **Defendant**

Hearing dates: 11th November 2021, 15th December 2021, 31st January 2022 (notification of agreement regarding outstanding phases of budgets)

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MASTER STEVENS

Master Stevens:

1. INTRODUCTION

This is my judgment on a security for costs application made by the defendant against each of the four corporate claimants in this action, in the sum of approximately £85,000 each (a revised figure from that originally sought in the application of £62,733.34 each or approximately £250,000 overall). The emerging overall total requested for security therefore now amounts to £340,000, up to and including the exchange of expert evidence.

2. This revised sum also includes £10,250 for each of the corporate claimants for the costs of this application, and approximately £11,250 each for the further costs on the Defendant's upcoming strike out application and its application in respect of outstanding Replies to a Request for Further Information. Only the costs of the first two applications were referenced in the original witness statement supporting the application, as they were contingency costs included in the defendant's budget, but they were *not* referenced as additional sums to be added to the security requested. If the expert stage is reached, the defendant says it will then seek a further sum by way of security for costs up to trial. The application was made shortly before the first case management conference.

3. FACTUAL BACKGROUND TO THE CLAIM

The claim arises from a decision by each of the claimants to invest in an option trading strategy known as the "Protected Index Option Strategy" with the defendant's predecessor in title, FXCM Securities Limited in 2014. The investments were not successful, and the claimants lost almost the entirety of their investments. The claim is particularised in the region of £5M together with excess commission charges which may be a further substantial sum. The claimants allege the defendant is liable for those losses because, when allegedly providing them with advice and management services, it committed breaches of contract and statutory duty, was negligent and is also said to be liable in misrepresentation. The allegations are fully denied and the defendant maintains at paragraph 5.1 in its Defence that the claimants "were all highly experienced and sophisticated investors".

4. PROCEDURAL CHRONOLOGY

DATE	**EVENT**
22.1.16	Intimation of claim by Claimants' solicitors to the Defendant
13.9.16	Letter before action
9.12.16	Letter of response
3.4.20	Proceedings issued

29.7.20	Proceedings served
13.11.20	Defence served
14.12.20	Defendant's Request for Further Information
15.1.21	Reply
5.2.21	Response to Request
5.2.21	Notice of hearing for CCMC
12.10.21	Mediation (failed)
20.10.21	Defendant changes solicitors
21.10.21	Costs budgets exchanged
28.10.21	Security for costs application issued
11.11.21	CCMC (with request to hear application for security at the same time)
15.12.21	Hearing of application
31.1.22	Further CMC and notification that outstanding budget phases had been agreed
13.5.22	Defendant's strike out application on application dated 24.11.21 due to be heard (adjournment now agreed by consent)

5. **THE LEGAL TEST**

i) The Civil Procedure Rules at CPR 25.12 and 25.13 set out the factors to be considered. The court may make an order for security under CPR 25.13 (1) if-

(a) It is satisfied having regard to all the circumstances of the case, that it is just to make such an order; and

(b) (i) one or more of the conditions in paragraph (2) applies, or

(ii) an enactment permits the court to require security for costs.

ii) The relevant conditions (often referred to as "**gateways**") under CPR 25.13 (2) are –

(a) the claimant is-

(i) resident out of the jurisdiction; but

(ii) not resident in a state bound by the 2005 Hague Convention, as defined in section 1 (3) of the Civil Jurisdiction and Judgments Act 1982;

"….."

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to

pay the defendant's costs if ordered to do so;

(d) the claimant has changed his address since the claim was commenced with

a view to evading the consequences of the litigation;

"….."

(f) the claimant is acting as a nominal claimant, other than as a representative

claimant under Part 19, and there is reason to believe that he will be unable

to pay the defendant's costs, if ordered to do so;

Gateways

6. The defendant clearly set out in both its application, and skeleton argument, why the conditions were met in respect of various gateways for each of the corporate defendants, as required by the rules. On the eve of the CCMC, the claimants' solicitor filed a witness statement resisting the application but not contesting the gateway conditions. Resistance to the application was mounted on the grounds that it would not be just in all the circumstances.

Discretion

7. As the notes in the White Book at 25.12.5 make clear, proof of one or more grounds for seeking security does not by itself ensure that an order will be made. Therefore, the outcome of this application rests very firmly on whether I determine an order for security would be just in all the circumstances. All interim remedies within CPR 25 are discretionary, and the discretion is to be exercised judicially within a framework of case law.

8. The court has the widest possible discretion as to whether to award security, and if so, in what amount. In exercising its discretion, the court must seek to give effect to the overriding objective and should not impair the right of access of a party to the courts which could lead to a breach of Article 6 (1) of the ECHR.

9. It is as well to set out the overriding objective, which is to enable the court to deal with cases justly, and at proportionate cost, which includes so far as is practicable-

   (a) ensuring parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

   (b) saving expense;

   (c) dealing with the case in ways which are proportionate-

      I. to the amount of money involved;

      II. to the importance of the case;

      III. to the complexity of the issues; and

      IV to the financial position of each party;

   (d) ensuring that it is dealt with expeditiously and fairly;

   (e) allotting it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

   (f) enforcing compliance with rules, practice directions and orders.

Factors which may be relevant to the exercise of discretion

(1) Timing of the application

10. The notes in the White Book at 25.12.6 reference the Commercial Court Guide which requires the first application for security to be made no later than the first case management conference. The notes go on to say that the court may refuse an application if the delay has deprived the claimant of time to collect security, or led them to act to their detriment, or may cause hardship in the future conduct of the action. In the latter circumstance, security may be limited to future costs only.

(2) Stifling of a claim

11. If the effect of an order for security would prevent the respondent from continuing its claim, then it should not be ordered. The claimants did not seek to persuade me that this was a live issue at the hearing of the application so I will say no more about it. The case law is clear that "The burden is on the Claimant to establish the probability that her claim would be stifled if she were ordered to pay… security for costs" (as per Teare J at [29] in *Danilina v Chernukhin & Others* [2018] EWHC 2503 (Comm)).

(3) Merits

12. The Court of Appeal in *Chernukhin v Danilina* [2018] EWCA Civ 1802 at [69] held that parties should not attempt to go into the merits of the case unless it can be clearly demonstrated that there is a high degree of probability of success or failure. Whilst the witness statement filed by the defendant's solicitor in support of the application touched on merits, counsel's skeleton referred to the pending strike out application and encouraged me not to consider merits unless my determination of the matter was otherwise in the balance.

13. Additionally, counsel for the defendant referred me to the claimants' solicitors' letter of 2nd November 2021 (at page 360 in the bundle) which stated "In the circumstances, we would submit that it is not appropriate for the Court to review the merits of the claim during its consideration of your client's application for security. Nonetheless, should the Court decide to consider the merits as part of its analysis of the application, we are confident that the claim is sufficiently robust to stand up to such scrutiny".

14. As the claimants' skeleton argument did not address the issue further I see no need to detain myself with it now. In any event, at this pre-disclosure stage in proceedings, I have seen no evidence of a high degree of probability relating to the outcome either way. The claim is multi-faceted.

(4) The existence of suitable After the Event insurance (ATE)

15. It is now well established that the existence of a suitable legal expenses insurance policy can be taken into account when considering making an order for security for costs. The leading case is *Premier Motorauctions Ltd v Pricewaterhouse Coopers LLP* [2017] EWCA Civ 1872. That case also established that defendants are entitled to some assurance that insurances are not liable to be avoided for misrepresentation or non-disclosure. Close examination of the policy terms is therefore required.

16. Akenhead J in *Michael Phillips Architects Ltd v Cornel Clark Riklin and Another* [2010] EWHC 834 (TCC) held, when summarising the relationship between security and ATE, "it is necessary where reliance is placed by a claimant on an ATE insurance policy to resist or limit a security for costs application for it to be demonstrated that it actually does provide some security. Put another way, there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendants costs".

17. Sometimes insurers will execute a Deed of Indemnity in favour of the defendants to mitigate the risk caused by the absence of an anti-avoidance clause in the policy terms. Much depends on the type of avoidance that is perceived as the greatest risk. Such a Deed

would provide for any costs ordered to be paid directly to the defendant without any set-off. Christopher Clarke J approved such a course in *Verslot Dredging v HDI Gerling Industrie Vesicherungag AG* [2013] EWHC 658 (Comm) noting that such a deed, being a direct contract with the defendants, was rather better than an ATE policy itself which might be subject to avoidance, misrepresentation or non-disclosure. Such a deed can also overcome difficulties in accessing the benefits of the policy if the insured becomes insolvent as discussed in *Ure Energy Limited v Notting Hill Genesis* [2021] EWHC 2695 (Comm) at [45] and in *Mr Nigel Rowe & Others v Ingenious Media Holdings PLC & Others* [2020] EWHC 235 (Ch) which I will return to at paragraph 42.

18. A *reduction* in the amount of security ordered to reflect the residual value of the ATE policy, after discounting for the risk of the policy being avoided at some stage, has also been seen as a suitable option on occasion. For example, Foskett J at [69] in (*Bailey v GlaxoSmithkline UK Ltd* [2017] EWHC 3195 (QB)), recognised that no claimant would have any interest in a worthless ATE policy. But at [70] "I do not think it is possible to discount as illusory the prospect of the avoidance of the ATE insurance cover at some stage". He deducted 2/3 from the sum otherwise to be ordered for security, when exercising a broad discretion to recognise the value of some cover under the policy.

Submissions and my determination on each issue

(1) Culpable delay

19. The claimants strongly contended that it would not be just in all the circumstances to order security due to what they described as the defendant's "culpable delay" and their prejudice said to arise from it. They sought to rely on the fact that the CCMC had been listed in February 2021 and an assertion that the defendant could have made the application much sooner when less costs would have been incurred. Furthermore, they referenced that the defendant had indicated in its Directions Questionnaire that it did not intend to make any applications. They also said the time estimate was far too short for the application to be heard at the CCMC and, by raising the application shortly before that hearing, it had had a detrimental effect on proper and effective case management of the claim.

20. The claimants also complained about needing to deal with a number of queries raised on the ATE policy at short notice. They referred to the fact that the commentary notes to the White Book record that an application for security should be "made promptly" and as soon as the facts justifying an order are known. There was a clear sense within their submissions, that the claimants felt somewhat ambushed by the timing of the application, which they said left them without proper opportunity to consider their position or enough time to comply with any application.

21. Finally, the claimants relied on *Bennet Invest Ltd* [2015] EWHC 1582 (Ch) at [28] "the order for security for costs comes with a sanction which gives a claimant a choice whether to put up security and go on or to withdraw his claim; that choice is meant to be a proper choice, and the claimant is to have a generous time with which to comply with it. … the making of an order for security for costs is not intended to be a weapon whereby a defendant can obtain a speedy summary judgement without a trial". They considered that the defendant had adopted a deliberate delaying tactic which should carry considerable weight in the exercise of court's discretion.

22. The defendant, meanwhile, relied on the fact that the application had been filed prior to the first CCMC at which budgets would be set, which would assist in determining the correct quantum for any security to be ordered.

23. In addition, the defendant contested that any delay could be said to be "culpable" on the basis that parties had been putting efforts into a mediation following the close of pleadings. That mediation took place on 12th October, it failed but further attempts were made to settle in the following days. The application itself was foreshadowed very shortly afterwards in correspondence dated 21st October 2021, with the application itself being issued just 1 week later.

24. Furthermore, the defendant denied that any detriment could have been caused to the claimants even if I considered that there had been some delay, by virtue of the fact that the claimants did not incur any material costs after the response to the Request for Further Information, save for the mediation and costs of preparing for the case management hearing. They also alluded to the claimants never having suggested they would have discontinued their claims if they had known about the possibility of an application for security at an earlier time. Whilst this point had not been pushed strongly by the claimants, I have noted "whispers" of it in some of the documents, but nothing of force.

25. I made it plain at the CCMC that I considered that suggestions as to delay would not assist the claimants in the context of trying to defeat the present application. My considered view, following the second hearing, is that there has indeed been no "culpable delay" for the reasons enunciated by the defendant. The notes in the White Book, as referenced above, are also consistent with this view. Many of the points made by the claimants about a shortage of time with which to deal with the application were also overtaken by my adjournment of the application which I set out more fully below at paragraph 28.

26. I will consider the second limb of the claimants' argument in this regard, namely that the timing of the application should lead to me disallowing any security for the defendant's *incurred* costs, or at least significantly reducing them, below under the section on Quantum.

(2) The presence of an ATE policy

27. The first reference to an ATE policy, and its suitability to meet an adverse costs order, was in the claimants' solicitors letter of 2nd November 2021. The policy was not specifically identified but there was an assertion made that "the ATE insurance secured by our clients provides sufficient cover in respect of any proper claim for security at this stage." The defendant replied by letter on 3rd November 2021 acknowledging that such a policy could in theory be an answer to an application for security for costs. They set out the case law which they said determined what a respondent must demonstrate if they wish to rely on such a policy.

28. On 10th November 2021, a witness statement in response to the application was served by the claimants' solicitor (i.e., on the eve of the CCMC when the defendant had hoped to secure a determination on its application), and this exhibited a redacted copy of the ATE policy itself. At the CCMC I made an order that the defendant be permitted to raise further questions of the claimants as to the adequacy of the policy, as I considered that this information would be necessary for my final determination on the application.

29. On 19th November 2021 the defendant's solicitors raised multiple questions about the policy terms which they said were directed towards whether it would provide sufficient security. Extensive correspondence followed which I will summarise below.

30.

Date	Comment
2.11.21	Claimants' solicitors write that "There is no real risk of avoidance and/or cancellation. The Claimants have instructed experienced solicitors and Counsel who have consulted with the ATE insurer at all times and will continue to do so….It is in the best interests of the Claimants to ensure that the steps necessary to preserve the sanctity of the ATE insurance policy are taken during the litigation"
10.11.21	Witness statement on behalf of the claimants at paragraph 20 stated that the policy "with anti-avoidance provisions included if necessary, will give the defendant sufficient protection"
19 .11.21	Defendant's letter still raising numerous questions about the adequacy of the policy terms
3.12.21	Claimants' replies referencing that a Deed of Assignment had been entered into governing apportionment sums payable under the policy. A copy of the Deed was not supplied. Also, the claimants were prepared to offer "an anti-avoidance endorsement (the wording of which will be agreed between the parties and the ATE insurer) as part of a package of measures to secure withdrawal of the application"
6.12.21	Defendant's letter identifying considerable risks that remained
9.12.21	Claimants supply a copy of the Deed and a copy of a schedule to the ATE policy which they had drafted by way of proposed anti-avoidance endorsement
13.12.21	Defendant's solicitors provide a track changed version of the anti-avoidance provision which they would accept, alongside an increased level of indemnity
14.12.21	Counsel's skeleton argument for the defendant referred to numerous clauses in the policy which did not provide sufficient protection due to the risk of avoidance, but at

	paragraph 80 confirmed that if a suitable final draft of amendments to the policy could be agreed in relatively short order that would be acceptable by way of security

31. Having received further information concerning the policy, the defendant submitted at the hearing on 15th December that:

(i) The sum covered by the policy was woefully inadequate. I will consider this point later in my judgment as it goes chiefly to the question of the appropriate amount of security, rather than whether additional security is required at all. Additionally, the precise amount of cover available was something of a "moveable feast" during the hearing as additional top-up indemnity had been sought by the claimants following the issue of the defendant's application.

(ii) there was a very high risk that the policy would be avoided, such that it was not a suitable form of security

Risk of avoidance

32. The claimants' position regarding the suitability of their ATE policy in terms of anti-avoidance measures shifted markedly between their responses to the application and their submissions at the hearing. This is most easily summarised in tabular form, it being necessary to form a clear picture as to what was on offer by the time of the hearing, and the residual risks noted by the defendant. The table below sets out the disputed clauses and the defendant's concerns about them. I was not provided with specific detailed submissions by the claimants in reply to these points, save for clause 3.1 (possibly because they had already said they would work with the defendant and ATE provider to reach a resolution about suitable anti-avoidance clauses) and their submissions were more directed to case law which I will consider below.

Clause	Wording	Defendant's objections
2.1	Subject to the terms and conditions of this Policy, the Insurer agrees to indemnify the Insured against the payment of Opponent's Costs and Own Costs and Disbursements if the Proceedings are not Successful up to the Limit of Indemnity stated in the Schedule	The policy is clear that cover will not be provided if the claim is "successful", meaning any payment by way of damages is made but there is a substantial possibility that the defendant might be ordered to make a small payment of damages but would obtain its costs
2.5.1	Subject to the terms and conditions of this Policy, and for the avoidance of doubt, the Insurer shall have no liability under this Policy if: The Proceedings are settled in full or compromised on the basis of any payment to the Insured	The policy is clear that cover will not be provided if the claim is "successful", meaning any payment by way of damages is made but there is a substantial possibility that the defendant might be ordered to make a small payment of damages but would obtain its costs

3.1	The Insurer shall not indemnify the Insured in respect of: Opponent's Costs and/or Own Costs and Disbursements incurred prior to the Inception Date unless agreed by the Cover holder in writing	The policy was incepted on 27th July 2020 but the signed witness statement of the defendant's solicitor dated 8th December 2021, records that there was substantial correspondence and costs prior to this date which would not be covered at all
3.2	The Insurer shall not indemnify the Insured in respect of: Opponent's Costs and/or Own Costs and Disbursements if the Insured is Successful in the Proceedings	The policy is clear that cover will not be provided if the claim is "successful", meaning any payment by way of damages is made but there is a substantial possibility that the defendant might be ordered to make a small payment of damages but would obtain its costs
3.8	The Insurer shall not indemnify the Insured in respect of: Any matter in respect of which the Insured is, or would be but for the existence of this Policy, entitled to indemnity under any other policy of insurance	The defendant was concerned on 8th December 2021 that the claimants had not confirmed there were no other relevant policies. By letter dated 9th December 2021, the claimants' solicitors said, "We understand that there are no other policies of insurance…". The defendant was not satisfied by this

33. The claimants' response to clause 3.1 was to cite a letter at page 318 in the bundle where the defendant's solicitor had referred to a lack of pre-action correspondence between the parties, such that the risk of any significant uninsured pre-ATE adverse costs was not made out. I considered there was force in this submission.

34. The claimants' chief principled opposition to the defendant's points about anti-avoidance was that the risk of anti-avoidance was "theoretical" and "not an important risk" such that it should be put into a proper context. This together with the new proposed ATE anti-avoidance wording for £170,000 adverse costs cover for the corporate claimants, they felt left nothing to argue about, save for the costs of the application. They sought to rely heavily on *Ure Energy Limited v Notting Hill Genesis* [2021] EWHC 2695 (Comm) where Christopher Hancock, sitting as a judge of the High Court, considered an ATE policy at length, with a number of similar terms to the claimants' policy. He decided in the end that it was an acceptable substitute to an order for security for the defendant to rely on £100,000 ATE cover for adverse costs (of the £500,000 available under the policy). I have already mentioned this at paragraph 18, and will return to the issue of allowing a discounted sum under the policy as acceptable adverse costs cover in my final conclusions.

35. It is fair to say that whilst written skeleton arguments contained submissions on many clauses within the ATE policy, a comparison of the draft anti-avoidance endorsements prepared by each party as acceptable, significantly narrowed the issues. I understand that any such endorsement would be subject to ATE provider approval, but I still consider that my focus should be on the clauses remaining in dispute, to test the adequacy of the policy.

36. There is force in the defendant's submission that "The Court should proceed on the basis that an insurer will seek to avoid a policy if it considers it right to do so". The

defendant relied upon the decision in *Premier Motorauctions* in this regard at [27] "One knows that ATE insurers do seek to avoid their policies if they consider it right to do so: see *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) plc* [2011] Lloyd's Rep IR 101 in which a successful defendant was unable to recover its costs from ATE insurers. The landscape after the trial may be very different from the landscape as it appears to be at present and it is unsatisfactory to have to speculate".

37. In addition, the defendant objected to a general statement at the beginning of the endorsement which provided that only if proceedings did not reach a *successful* conclusion, *as defined by the policy wording*, and the court ordered costs against the insured, would it pay the opponent's costs for the proportion said to be payable by the corporate claimants. This objection is understandable as the policy definition of the word "*successful*" means "that the Opponent is to make a payment of damages or other remedy to the Insured either by way of compromise or Order". The defendant's objection appears consistent with their objection to clauses 2.1, 2.51 and 3.2 which I have set out in some detail at paragraph 32 above.

38. Finally, concerning the draft endorsement, the defendant objected to a limit of £170,000 in respect of an adverse costs order. That objection goes to quantum so I will return to it later in this judgment.

39. The defendant also remained concerned by the continuing redactions to the disclosed ATE policy which were said by the claimants to relate to arrangements amongst themselves. Without more specific information the defendant's concern was a fear that the *individual*, i.e. non-corporate claimants, might have the first call on the policy under those arrangements. That, it was said, would render the policy worthless for costs as against the corporate claimants who are the subject of the application for security. This concern is material, but the lack of transparency should not be difficult to resolve one way or another.

40. The defendant's other remaining objections concerned the absence of a direct Deed of Indemnity from the ATE insurer. This is a rather different anti-avoidance measure as it does not concern a default due to a breach of policy terms, but a situation that may arise upon a claimant's insolvency. It is not so relevant in every situation where an ATE policy is being considered judicially as an alternative to ordering separate security for costs. It is obvious why the defendant has raised it in this case, where three of the corporate claimants have only ever filed dormant accounts with just £1-£100 on their balance sheets and the fourth is a nominee company whose "sole purpose and function is the safe keeping and management of client monies".

41. The only copy Deed produced so far in relation to this application is not a Deed of Indemnity. It is dated 31st December 2020 and executed between two of the insured, the ATE provider and the third party funder. This Deed does not address the issue of anti-avoidance and how it could impact the defendant, as it merely deals with an assignment of the insureds' own costs ATE benefits (i.e. **excluding** adverse costs cover) to the funder. The only useful point about this Deed is that it does supply the figure for apportionment of cover allowed for adverse costs i.e. £320,000 for *all* claimants.

42. On the issue of requirement for a Deed of Indemnity, the authority in my bundle of *Mr Nigel Rowe & Others v Ingenious Media Holdings PLC & Others* [2020] EWHC 235 (Ch) is instructive. In that case, at [128] Nugee J, noting counsel's submissions about gaps between ATE policies and an offer of assignment, stated "Defendants have no right to the

policy moneys as such. Subject to the rights given by the Third Party (Rights Against Insurers) Act 2010 (to which I was not referred, but which as I understand it only applies if the insured becomes subject to an insolvency procedure), the policy moneys belong to the Claimants, and may be available to meet the Claimants other creditors". Nugee J continued at [135] that if an ATE policy was assigned it remained unclear if the terms would allow the defendants to claim directly against the ATE insurers or whether they would "merely have rights as personal creditors of the Claimants or [the litigation funder] Therium" [135].

43. The situation remains in this case that without a Deed of Indemnity, providing a direct route of access for adverse costs cover payments from the ATE provider to the defendant, their exposure to the risk of an unpaid costs order remains a live issue. The decision in *Harlequin Property* (*SVG) Ltd and Another v Wilkins Kennedy (a Firm)* [2015] 3 Costs L.R. 495 at [21 9d] is helpful in that it stipulates consideration of sufficient protection should be based upon an assessment of whether there was more than a mere theoretical, or fanciful, possibility of avoidance. The learned judge went on to find that the defendant's status as a third party under the ATE policy did render it vulnerable and held at [37],"It seems to me that this could be dealt with either by the provision of a direct indemnity, or an endorsement which provided that any costs ordered to be paid to the defendant would be paid directly, without set-off".

44. Whilst the claimants sought to rely upon the decision in *Ure*, referred to previously, I accept the defendant's submissions that the factual matrix does not readily transfer to the instant case. The ATE provider in *Ure* had already agreed to a loss payee clause, so that the defendant, whilst not a party to the insurance, had the benefit of any payout under the policy. Also in that case security had only been sought for the pre-CCMC phase so it was fairly limited in scope and amount.

45. My conclusions about the adequacy of the policy in general (leaving aside the level of cover until I consider quantum later) are that:

a) I have received no confirmation that the suggested anti-avoidance endorsement supplied by the claimants will be approved by the ATE provider. Without any anti-avoidance provision at all (as in the original, and currently only, approved terms) I am bound to conclude, in accordance with case law, that the policy is inadequate in place of additional security. Whether to consider the level of indemnity provided (absent anti-avoidance), in discounted form, as partial security is better addressed in my consideration of quantum. In addition, the difficulties of being a "third party" under the policy, as described at paragraph 40, remain to be resolved.

b) I am not asked to determine the suitability of the final drafting suggestions from the defendant for the endorsement, but to consider a short period for the parties to seek to reconcile their differences, if I am not minded to immediately make an order for separate security. I consider it would be wasteful, and therefore inconsistent with the overriding objective, for me to ignore the ATE policy altogether, and the work already undertaken by the parties to narrow the gap in terms of suitable additional anti-avoidance provision.

c) I hope it is helpful to comment briefly on what appears to be one of the more significant drafting suggestions made by the defendant, although I would not

make a final adjudication at this point as it has not been requested, nor have I had specific submissions from the claimants upon it. I simply say that I can see it is not without merit to draw attention to the constraining nature of the current draft in terms of facilitating proposals between the parties for overall resolution. This is in an era when dispute resolution, without the expense of a full trial, has probably never been more highly commended by policy makers and senior members of the judiciary alike. Currently under the policy terms any settlement by payment of damages, however small, or some form of discontinuance (clauses 2.5.1 and 2.5.3) without paying damages, would seem to have the potential to obliterate any adverse costs cover under the policy.

Exercise of discretion as to whether to order security

46. There was no contention between the parties by the time of oral submissions that the relevant "gateway" conditions are satisfied for security to be ordered, pursuant to CPR 25.13 (2), and there were no submissions that provision of security would have the effect of stifling the claim. I have also determined:

    a) that there is no culpable delay on the part of the defendant in making the application,

    b) that the ATE policy in its current form is inadequate security,

    I therefore conclude that it is just in all the circumstances to make an order security for costs. This is absent the parties being able to agree an anti-avoidance endorsement to the policy (to include resolution of the direct payment issue whether by deed or otherwise), within a reasonably short time frame of handing down this judgment, and the level of indemnity being for an amount that satisfies my quantum determination which follows.

47. I accept the defendant's submission that it would be deeply unjust for the individuals behind each of the corporate claimants to avail themselves of the full benefit of any recovery from the defendant, without having to bear the risk of any adverse costs award against them. I have been made aware by the claimants that their legal team is working under conditional fee agreements, and it is commonly the case that such arrangements will be backed up by insurance funding mechanisms to meet adverse costs orders. The case law is clear that anti-avoidance provisions are normally required to successfully fend off a claim for security, where other gateway conditions have been met. I therefore do not believe it should have come as any surprise to the corporate claimants that security would be required if there is no suitable ATE policy in place.

48. I believe that the defendant's approach has been proportionate in seeking security only from the corporate claimants, which represents less than half the overall costs bill, and also by limiting the security requested at this stage to the conclusion of the experts phase.

THE AMOUNT OF SECURITY

Indemnity/standard basis

49. It is first necessary to consider the basis of any costs order to be made. The defendant urged me to consider ordering an amount of security to reflect a realistic prospect of an indemnity costs order in favour of the defendant. This they said would entitle them to a 70% recovery rate for incurred costs, and a 100% recovery rate for estimated and approved costs within the budget. Counsel insisted these figures were conservative as there was good or authority for a 75% recovery rate where there is a realistic prospect of indemnity costs, and they are not budgeted.

50. The factors which I was asked to bear in mind when considering an indemnity costs order included the assertion that the defendant was wrongly and baselessly accused of dishonesty by the claimants in the Particulars. Also that the claim was on any view substantially overinflated, it was not properly particularised and a number of claims were improperly pleaded and baseless as they were founded on assertions that could only have been made with the benefit of expert evidence, which was not obtained.

51. Whilst the claimants' skeleton argument did not expressly address indemnity basis costs, it was implicit that they did not consider this to be appropriate. Counsel sought to persuade me that any security ordered should be no more than 60% of estimated costs based upon *Stokors SA v IG Markets* [2012] EWCA Civ 1706.

52. I have now had the opportunity to read *Stokors.* In that case it had been submitted, at first instance, that there was a real prospect of indemnity costs because there were "serious allegations of dishonest conduct on the part of professional men, allegations which can have the outcome of ruining careers, and that in such circumstances, if such allegations were not made out, the judge might feel it appropriate to make an order for indemnity costs against the claimants". At first instance Popplewell J had rejected the argument, because submissions that the claim was speculative and weak would involve an assessment of the merits of the case. He instead ordered security at broadly 62% of the costs as claimed. This finding was not the subject matter of the appeal, but Tomlinson LJ concluded at [42] that it had been correct not to go into the merits of the case. He commented, "I have never heard of security for costs being awarded on a more generous basis for that reason".

53. More recent authorities within the bundle included *Bruce MacInnes v Hans Thomas Gross* [2017] EWHC 127 (QB). Coulson J (as he then was) reviewed the existing case law concerning the indemnity basis for security for costs. At [3], when summarising the principles of indemnity costs he concluded:

(a) "Indemnity costs are appropriate only when the conduct of a paying party is unreasonable "to a high degree". "Unreasonable in this context does not mean merely wrong or misguided in hindsight" as per Simon Brown LJ (as he then was) in *Kiam v MGN Limited* [2002] 1WLR 2810".

(b) The court must therefore decide whether there is something in the conduct of the action, or in the circumstances of the case in general, which takes it "out of the norm" in a way which justifies an order for indemnity for costs: see Waller LJ in *Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ. 869.

(c) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order: see, for example, *Wates Construction Limited v HGP Greentree Allchurch Evans Limited* [2006] BLR.

54. At [10] Coulson J concluded "In the round, I am confident that this is not a case which could fairly be described as being "out of the norm". It is instead a not untypical dispute between commercial men where, on an analysis of the factual evidence and the contemporaneous material, the claim failed for a variety of separate reasons". It should be noted, in the present context, that the learned judge was considering the correct costs basis for assessment of a payment on account and any deduction from budgeted costs, after the trial, but his conclusions concerning indemnity costs generally are nonetheless helpful.

55. In *Danilina v Chernukhin & Others* [2018] EWHC 2503 (Comm), when making an application for security, the defendants said it was highly likely that costs would be allowed on the indemnity basis, post-trial, as the claimants would have given evidence known to be false. Teare J held at [17] the court should take account of the possibility of an indemnity costs order but noted, "That conclusion does not involve an assessment of the merits of the claims but simply an appreciation of the nature of the claims". He continued, that where indemnity costs are not a possible prospect, or it is "no more than speculative" that they would be awarded, 60-70% would be the appropriate range for a security for costs order. If there was a reasonable possibility of indemnity costs, then 75% should be ordered. I note that this case had not been budgeted so Teare J was relying on costs schedules.

56. Finally, the most recent case in the bundle on this topic was *Mr Nigel Rowe & Others v Ingenious Media Holdings PLC & Others*[2020] EWHC 235 (Ch). It was submitted for the defendants at [90] that there was "a real possibility of indemnity costs being awarded in their favour if successful". Counsel for the claimants had said there was no real likelihood of indemnity costs at [91] despite claims of dishonesty being pleaded. Nugee J considered that as many of the representations were written, there could be little or no dispute as to what was said. Continuing at [91], Nugee J commented that the "issue will be not so much whether the Claimants are telling the truth but whether what the Defendants said was untrue, and whether the relevant Defendants knew that".

57. At [92] Nugee J said, "I find it quite difficult at this stage of the proceedings to assess to what extent the individual Claimants' cases will turn on their credibility. I will assume however that the main issue at trial will not be whether the Claimants are putting forward a deliberately false story supported by perjured evidence. But that is not necessary to justify an award of costs on the indemnity basis. As is well known, the jurisprudence in this area establishes that while there must be something to take the case out of the norm…the categories of case in which indemnity costs are justified are not closed and vary enormously…". Then he quoted factors taking cases out of the norm, by reference to Tomlinson J in *Three Rivers DC v Bank of England* [2006] EWHC 816 at [25], "Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time".

58. Nugee J continued, "to accuse people of fraud or dishonesty is a high-risk strategy, and if such allegations are made but not established, that can certainly in my judgment be a factor justifying indemnity costs, whether the claimants have lied or not. Of course it is not an automatic consequence ..-…but it is certainly a highly material consideration".

Conclusions on the correct basis for assessment

59. Having reviewed the case authorities, listened to submissions and re-read the Particulars of Claim, I conclude that at this juncture it is not appropriate to make an order on the indemnity basis. Disclosure has not yet taken place, but paragraphs 13,14 and 15 of the Particulars refer to documentation in addition to oral representations. On this basis, the most recent authority of *Rowe* is instructive. I am also mindful that security is only being sought against the corporate claimants, but many of the representations made do not appear to have taken place in the presence of directors of those companies, apart from the seventh claimant. Those corporate directors, alongside other individual investors/claimants, had information "disseminated" to them after the meetings according to the Particulars, which I understand to mean by way of documentation, or at least not by oral representations of the defendant. In addition, much of the work to be undertaken in this case involves other breaches than misrepresentation.

60. I do not consider it helpful or necessary to delve further into the adequacy of the pleadings as a basis for making an indemnity costs basis order. They are lengthy and complex and already listed to be the subject of an early strike-out application. The defendants have indicated that they wish to apply to the court to top up the level of security once the experts phase has been completed; that would appear to be a better occasion at which to consider whether to order any further security, on an indemnity costs basis, if at all.

Amount of costs to be ordered as a percentage on the standard basis.

61. There was a large difference in the cases cited to me, between claims where judges were asked to review cost schedules and those cases where a budget had been approved by the court. As Coulson J (as he then was) remarked about a budgeted case, in *Bruce MacInnes v Hans Thomas Gross* [2017] EWHC 127 (QB) at [27], "Days of educated guesswork identified by Jacob J in Mars UK Limited v TeKnowledge Limited [1999] 2 Costs LR 44 are now gone. Instead the court can now be confident that there is a figure for costs which, because it has already been approved, is both reasonable and proportionate".

62. Similarly in *Sarpd Oil International Limited v Addax Energy SA & ANR* [2016] EWCA Civ 120, Sales LJ at [39] quoting CPR 3.18, held that the court should not depart from an approved or agreed budget unless satisfied there is good reason to do so. That is a helpful indicator in respect of estimated/approved costs but does not deal with incurred costs. In the *MacInnes* case Coulson J nonetheless deducted 10% from estimated costs when ordering a payment on account, which is a slightly different exercise to the one I have to undertake. In the *Sarpd* case there had been a comment by the costs managing judge at the budgeting hearing that incurred costs appeared reasonable and proportionate which was of assistance when determining the correct award of security. No such judicial comment on the defendant's budget in this case was recorded at the CCMC.

63. The figures allowed for incurred costs, in the other cases to which I was taken, all related to schedules of costs rather than more precise budgets, and therefore were overall figures for the total security claimed. These ranged from 50% (where delay reduced the more usual minimum 60% rate) up to 70% on the standard basis.

64. **The amount sought (as amended)**

Incurred costs

Table of incurred costs sought within the security

Phase	Claimants (budget dated 21.10.2021) £	Defendant (budget dated 8.11.2021) £
Pre-action	49,445.00	0
Statements of Case	108,598.26	224,850.00
CMC	20,665.50	15,625.00 though not initially included in the total below as wrongly included in the estimated column NB 17,110.00 by 17.11.2021(post CCMC)
Disclosure	2799.50	0
Witness statements	0	0
Experts	29,869.50	500.00
ADR	16032.50	34,000
TOTAL	227,410.26	259,350.00 pre-17.11.21 when CCMC costs were sought as estimated not incurred (276,460.00 after) but referenced in the defendant's submissions as £242,460

65. The defendant has contended for its incurred costs to be allowed for within the security ordered. It has been confirmed by their solicitor's statement in support of the application that all such costs (save for those relating to the CCMC) relate to the firm instructed prior to Rosenblatt taking over conduct of the case. The defendant accepted that the court might wish to impose a reduction on the basis it is unlikely 100% of incurred costs will be recovered. If security was not to be ordered on an indemnity costs basis, then 70% was contended for as an appropriate proportion. Counsel acknowledged that in *Danilina v*

Chernukhin [2018] EWHC 2503 (Comm) at [17] a range of 60-70% was said to be appropriate for standard basis costs.

66. The claimants contest any allowance for such incurred costs on the basis that the defendant's delay in making the application should deprive them of those costs, or at least they should be significantly reduced. They pointed to the large sum claimed for incurred costs (£259,350 excluding CMC) and asserted they had no indication whatsoever that such a sum could have been accruing until the defendant's application. They described the defendant's conduct as a "deliberate delaying tactic". They relied upon *Bennet Invest Ltd* [2015] EWHC 1582 (Ch) at [28] and *Warren v Marsden* [2014] EWHC 4410 (Comm).

67. I note the defendant was initially represented by Mishcon de Reya, then Bryan Cave Leighton Paisner LLP (BCLP) and from 15th October 2021 (i.e. after the failed mediation) by the current solicitors, Rosenblatt. The summary of defendant's pre-action and incurred costs submitted for the CCMC and signed on 8th November 2021 states that it includes BCLP but no reference is made to Mishcon's fees.

68. In fact there are no pre-action costs claimed at all in the defendant's budget. Whilst I was without an explanation for this, on the basis that there was no claim for Mishcon's fees, and that they were the solicitors instructed to deal with the Pre-Action Protocol response, it is perhaps unsurprising.

69. From the issue of proceedings, the work is clearly allocated to budgetary phases with some degree of parity between the parties, save for the statements of case phase where the defendant's figure is much higher. However, the absence of any costs in three phases and minimal costs (i.e. £500) in one other, has the result of not vastly dissimilar totals between the parties for incurred costs overall.

70. On the issue of delay, or being taken by surprise as to the amount of work undertaken, I was not shown any correspondence from the claimants requesting details of costs incurred by the defendant prior to them arranging ATE cover. I do not know on what basis they made assumptions about the level of adverse costs cover required when taking out the policy. In my judgment, the only figures for incurred costs which seem particularly surprising, when comparing them with the claimants' own costs, are the lack of any claim for pre-action work and the sum recorded for the statements of case phase. As stated above, the global totals for all relevant phases are not strikingly unalike.

71. I was asked to reflect on the "excessive" sum the claimants say that the defendant has spent on the statements of case phase, where the costs claimed are more than double those of the claimants. I recognise that it is often said that the claiming party will have to undertake more work to get their claim off the ground satisfactorily, in order to satisfy their burden of proof, than a defendant. There are of course exceptions, and I recognise that the rather historic nature of matters complained of, allied with allegations of misrepresentation would present the defendant with a need to undertake some substantial work to produce an adequate defence. I note that the claimants have not taken out any applications on the basis of an inadequate pleading. I am not conducting a detailed assessment, when more detailed information is to hand, and given my earlier comments, about the near symmetry in overall costs I am not inclined to make a big discount to the overall percentage recovery to be allowed, simply on account of the costs of the statements of case phase.

72. I have already determined that there was no "culpable" delay by the defendant. I do consider that the claimants might have been taken by surprise that the defendant's incurred costs are said to be greater than theirs (especially as they have nine separate claimants to take instructions from, albeit that just four are relevant for my purposes in considering security) so I am prepared to take that into account. Overall, I do not believe it would be just for me to refuse to order *any* security for incurred costs. I would have expected the claimants to be contemplating adequate protection for adverse costs liability as a normal part of litigation management, whether or not a security for costs application was intimated. Overall, I consider that a sum of £80,000 is the correct level of security for incurred costs for the 4 corporate claimants together. This is about 65% of the incurred defendant's costs claimed. I am mindful of the comments of Nugee J in *Mr Nigel Rowe & Others v Ingenious Media Holdings PLC & Others* [2020] EWHC 235 (Ch) at [103], when discussing strict mathematical percentage sums allowed for security "such figures of course have a spurious precision about them, and it is usual to take a broad brush approach". That is what I have done in this case.

Estimated costs

73. The defendant sought to persuade me that in relation to budgeted costs, the appropriate figure for security should be 100% of the estimated costs and they referred to *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120 at [52]. They did mention in passing the case of *MacInnes v Gross* [2017] EWHC 127 (QB) where Coulson J stated that 10% was "the maximum deduction that is appropriate in a case where there is an approved costs budget" when calculating a payment on account of costs. The defendant asserted that this authority only served to reinforce the view that the full amount of budgeted costs should be used when assessing quantum for security.

74. The claimants however asserted that the amount of estimated costs sought, pre-CCMC in the defendant's budget, were disproportionate and unreasonable, such that security of no more than 60% should be permitted. A revised budget was produced by the defendant which led to a greater agreement between the parties as recorded below.

Table of estimated costs sought within the security

Phase	Claimants' approved costs £	Defendant's approved costs £
Statements of Case	9,340.00 (agreed sum after CCMC)	11,900.00
Disclosure	65,075.00	141,000.00 (agreed sum after CCMC)

Witness statements	65,625.00	108,200.00 (agreed pro-rata to number of witnesses pre-CCMC)
Experts	64,075.00	142,100.00 (broad level of agreement pre-CCMC)
Total for phases above	204,115.00	262,200.00 in counsel's skeleton plus disclosure costs = 403,200.00

75. Given the broad level of agreement between the parties over the defendant's estimated costs, and the case authorities I have referred to, especially *Sarpd*, I can see no reason not to allow security for 100% of the defendant's costs, with a pro-rata discount to reflect security being sought only against the corporate claimants. This results in additional security being ordered of £403,200 x 4/9th = £179,200 or £44,800 each.

Contingent costs

76. The original application notice and supporting witness statement made no claim for any of these costs in respect of the security application, a strike-out application and a Request for Further Information application. Indeed the latter item was not even included as a contingency within the filed budgets. Furthermore, it can be seen from the table below that the estimates for the cost of these applications has varied between different iterations of the budget (there were three budgets filed by the defendant's solicitor's dated 21st October, 8th November and 17th November 2021).

Table of contingent costs sought within the security

Event	Claimants £	Defendant £
Strike-out application	0	Claimed in the budgets as variously 50,505.00 and 56,505.00
Security for costs application	0	Figures varied between different versions of the budget and counsel's

		skeleton with a range from 35,755.00 to 41,000.00
Request for Further Information application (not included in budgets)		Said by counsel to be 100,000.00 to include the strike out application costs also

77. The claimants made no comment in their skeleton argument about the claim for contingent sums, save that in terms of the costs of the security application, they resisted them in full. It was clear from oral submissions that they opposed providing security for all of the applications.

78. There was just one case authority within the bundle which touched on the question of providing security for the security for costs application. This was *Frank John Warren v Stephen Richard Marsden* [2014] EWHC 4410 (Comm) where Teare J declined to add the cost of the application to the security, because he considered there was otherwise a risk of the claimants having to pay the costs twice, in the sense of paying them after the application, and providing security for them. This is consistent with Sales LJ at [24] in *Sarpd Oil International Limited v Addax Energy SA & ANR* [2016] EWCA Civ 120 "An order for security for costs looks inevitably forward to the time when, at the end of the trial, a party is ordered to pay costs." Sales LJ therefore seemed to have in mind that it was the prospect of a future development leaving the defendant unsecured which the application should be directed towards. When an ATE policy may be used both for security against a final costs order, and for meeting adverse costs liabilities as they arise, I fully appreciate the level of available indemnity can be eroded by answering to interim orders. That is a separate matter.

79. In all the circumstances I do not consider it just to add the cost of the security application to the security at this point in time. It does not appear consistent with case authorities to do so, the claim was not intimated in the initial application, and the sum sought has varied considerably over time. Furthermore, the work associated with these applications is not work that has been approved under case management powers and the applications may be compromised or may fail. And finally, any difficulty with the remaining level of indemnity under the ATE policy available, after meeting the cost of such an application, can be addressed at the future top-up security application which the defendant has indicated that they intend to issue.

80. As far as the other two applications are concerned, relating to strike-out and the Request for Further Information I am similarly uncomfortable to order security at this point in time. The costs associated with the applications were not included in the original request for security, the amounts claimed have varied between different versions of the budget and submissions and it is likely that if the applications are not compromised prior to any

hearing, a relevant costs order will be made at that point. Once again, if there is any difficulty caused by this approach it can be taken into account at the next application for security.

Conclusions

81. To conclude, in my judgment I consider 65% is a fair and reasonable amount of security for incurred costs, being a mid-range figure on the standard basis, as cited from the authorities I have mentioned. I have already stated that I can understand why the claimants may have been slightly taken by surprise at the amount of incurred costs claimed, hence why I am not ordering security at 70%, but I do not consider that any of the other aspects of prejudice I was asked to take into account are made out. The figure for security for incurred costs is £80,000. I will allow security of 100% of estimated costs (£179,200), as the majority of these were agreed between the parties, in accordance with case law about the purpose of budgeting. I decline to order any security in respect of the defendant's three applications.

82. In accordance with agreed convention, the sum to be paid by way of security is exclusive of VAT. It is also agreed between the parties that each of the corporate claimants will be responsible for the security on a several, rather than joint, basis. The overall total for which security is required is £259,200.

83. As the amount of cover available to the corporate claimants under the existing ATE policy is £140,000 (£320,000 pro-rata between nine claimants x four corporate claimants who are the subject of this application), the policy is currently "light" by £119,200 even before the question of suitability of policy terms is taken into consideration. I am aware that the claimants, by the time of hearing, were seeking to put in place a top-up to adverse costs cover so it would be £100,000 per claimant i.e. £400,000 for the corporate claimants with £170,000 of this backed with anti-avoidance provisions. If this cover was indeed secured, the policy would be adequate in place of separate security being ordered, subject only to the anti-avoidance issues, which in this case include problems of solvency and the need for consideration of a direct payment mechanism to the defendant. The latter point does not appear to have been covered off in claimants' solicitors' correspondence so it does need addressing. Case law suggests that it may be appropriate to still allow the cover under the ATE policy (without full anti-avoidance provisions) but in a discounted sum, in place of separate security that might otherwise be ordered. It is possible, therefore that if £400,000 overall adverse cover is provided with a £170,000 *suitable* anti-avoidance endorsement, it may be adequate, provided that the solvency issue is addressed, pursuant to the approach taken by Foskett J in *Bailey*.

84. I will await submissions as to the appropriate, but brief, amount of time I should allow in my Order for the claimants to endeavour to secure acceptable ATE terms (thus to conclude the dialogue already commenced between the parties, including the solvency issue), failing which security should be satisfied by way of each of the corporate claimants making a payment into court.

85. As requested, I will await further submissions from the parties before making a determination on the costs of this application.